

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MOSES HEPBURN, JR.,

Defendant-Appellant.

UNPUBLISHED

March 21, 2006

No. 258288

Oakland Circuit Court

LC No. 2003-189631-FH

Before: Davis, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions for involuntary manslaughter with a motor vehicle, MCL 750.321, and two counts of felonious driving, MCL 257.626c. We affirm.

This case arises from a rollover vehicle accident that occurred on I-75 which resulted in one person's death, and two people suffering serious injuries. Defendant was charged with driving his vehicle in a grossly negligent and reckless manner causing the accident.

On appeal, defendant first argues that there was insufficient evidence to establish that he was grossly negligent and caused the accident, thus, his involuntary manslaughter conviction should be reversed. Viewing the evidence in a light most favorable to the prosecution, we disagree and conclude that a reasonable jury could find all of the elements of involuntary manslaughter proved beyond a reasonable doubt. See *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

"An unlawful act, committed with the intent to injure or in a grossly negligent manner, that proximately causes death is involuntary manslaughter." *People v McCoy*, 223 Mich App 500, 502; 566 NW2d 667 (1997). Gross negligence in the context of involuntary manslaughter involves (1) knowledge of a situation requiring the use of ordinary care and diligence to avoid injury to others, (2) an ability to avoid harm by using ordinary care and diligence, and (3) the "failure to use care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another." *People v Albers*, 258 Mich App 578, 582; 672 NW2d 336 (2003). In other words, a defendant is grossly negligent when "the actor realizes the risk of his behavior and consciously decides to create that risk. . . . [T]he actor does not seek to cause harm, but is simply 'reckless or wantonly indifferent to the results.'" *McCoy*, *supra* at 502 (citations omitted).

We conclude that there was sufficient evidence to support defendant's conviction for involuntary manslaughter. The jury could have inferred from the evidence that defendant, an experienced driver, knew that driving on the interstate, in the evening traffic, required ordinary care. The eyewitness and expert testimony, however, indicated that defendant was driving erratically, swerving in and out of traffic, racing other vehicles at speeds of at least 100 miles per hour, when he lost control of his vehicle and hit the van in which the victims were passengers, causing the van to roll over. It was reasonable for the jury to conclude that defendant could have avoided the accident by using ordinary care and diligence.

Defendant's argument that his speeding alone was insufficient to establish gross negligence is noted, and rejected. This is not a case in which defendant was merely speeding when the collision occurred. His driving behavior was so obviously dangerous that motorists traveling in his vicinity telephoned 911 even before the collision occurred. And, defendant's explanation that his front tire blew and caused the accident was apparently rejected by the jury, whose role it is to make credibility determinations and weigh the evidence. See *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992). In sum, the evidence was sufficient for a jury to find defendant guilty, beyond a reasonable doubt, of involuntary manslaughter.

Defendant next argues that the trial court's instruction to the jury in answer to a question related to gross negligence was erroneous. After review de novo, we disagree. See *People v Schaefer*, 473 Mich 418, 427; 703 NW2d 774 (2005).

Jury instructions are read as a whole to determine whether an error requires reversal. *People v Lipps*, 167 Mich App 99, 107; 421 NW2d 586 (1988). "Generally, a trial court is required to instruct the jury on the applicable law and fully and fairly present the case to the jury in an understandable manner." *People v McDaniel*, 256 Mich App 165, 169; 662 NW2d 101 (2003). An appellate court should not reverse even somewhat imperfect instructions as long as they fairly present the issues to be tried and protect a defendant's rights. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

After reviewing the jury instructions as a whole, we conclude that the jury was properly instructed. During deliberations the jury submitted a question to the trial court concerning gross negligence. Specifically, the question pertained to the definition of "danger to another" as that phrase is used in the instruction. See CJI2d 16.18. The trial court answered the question by explaining that laws are designed for everyone and not designed for the individual person charged or the individual victim. Although the trial court did not repeat it while answering the jury's question, during initial instructions the jury was told that to find defendant guilty of involuntary manslaughter it must find that "defendant's gross negligence was a substantial cause of an accident resulting in injuries to Mary Ann Dunnom." The jury was also given written copies of the jury instructions, which included the above statement. Therefore, the overall instructions to the jury clearly informed it that it must find that defendant's gross negligence was a substantial cause of the accident in order to find defendant guilty of involuntary manslaughter.

Defendant next argues that the trial court erred when it scored offense variable (OV) 3 at 35 points. After review of the record to determine whether the score was supported by the evidence, we agree that OV 3 was wrongly scored; however, we conclude that resentencing is not required. See *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

The version of MCL 777.33 in effect at the time of the crime required, in relevant part, that OV 3 be scored at 35 points if a victim was killed during the commission of a crime and the elements of the offense involved the operation of a vehicle “under the influence or while impaired causing death.” MCL 777.33(2)(c). Here, there was no evidence suggesting that defendant was under the influence when the accident occurred. Therefore, the trial court erred in scoring 35 points under OV 3. However, based on *People v Houston*, 473 Mich 399, 407; 702 NW2d 530 (2005), OV 3 could have been scored at 25 points under MCL 777.33(1)(c). For the two counts of felonious driving, OV 3 should have been scored at ten, as both victims’ injuries required medical treatment. MCL 777.31(1)(d).

The change in scoring of OV 3 only changes defendant’s guidelines with respect to his involuntary manslaughter conviction. See MCL 777.64. As defendant admits, the guidelines for his felonious driving convictions do not change. With OV 3 scored at 35 points, defendant’s prior record variable (PRV) level was D and his OV level was VI, making his guideline range for the involuntary manslaughter conviction, as a third habitual offender, 50 to 150 months. See MCL 777.64. And, when OV 3 is scored at 25 points, defendant’s PRV level is D and his OV level is V, making his guidelines 43 to 129 months. Defendant’s minimum sentence of 72 months falls within the corrected guidelines. We therefore affirm defendant’s sentence. See *People v Houston*, 261 Mich App 463, 472-473; 683 NW2d 192 (2004).

Finally, defendant argues that he was denied his right to the effective assistance of counsel because his attorney failed to investigate a potential defense witness and failed to present evidence that would have benefited his defense. We disagree. Because a *Ginther*¹ hearing was not conducted, this Court’s review is limited to mistakes that are apparent from the lower court record. See *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

To prove an ineffective assistance of counsel claim, a defendant must establish that his counsel’s performance fell below an objective standard of reasonableness and that, but for his errors, there is a reasonable probability that the outcome of the proceedings would have been different. See *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Here, defendant argues that his counsel was ineffective because (1) he did not introduce into evidence a towing receipt which would have indicated that the left front tire on his vehicle blew out, and (2) he did not call as a lay witness Mike Zielinski who looked at the blown out tire. Defendant argues that this evidence would have supported his defense that a tire blowout caused him to lose control of his car and, therefore, he was not grossly negligent.

Typically, decisions as to what evidence to present and whether to call or question particular witnesses are presumed to be matters of trial strategy and we will not second-guess those decisions with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (citations omitted). But, a defendant is entitled to have his counsel present all substantial defenses. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Here, however, defendant was not deprived of a substantial defense. The towing receipt and proposed witness testimony would have only shown that the tire was flat after the car accident, not that the

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

flat tire occurred before the accident or that it caused defendant to lose control of his car. And, defendant testified that a tire blowout caused him to lose control of the car but, apparently, the jury chose to believe the prosecutor's evidence that defendant's erratic driving and excessive speed caused him to lose control of his vehicle. Therefore, defendant has failed to overcome the strong presumption that he received the effective assistance of counsel. See *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Affirmed.

/s/ Alton T. Davis
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot